

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-31

Date issued: December 23, 1998

Requested by: Bruce A. Selinger, Slope County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a person may serve as an elected state's attorney in a county in which the person is not a qualified elector.

II.

Whether a board of county commissioners may appoint a person who is not a qualified elector of the county to fill a vacancy in an elected state's attorney position.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion a person may serve as an elected state's attorney in a county in which the person is not a qualified elector if the county has a home rule charter and implementing ordinance authorizing such, or if the counties sharing the state's attorney agree to such an arrangement pursuant to North Dakota Century Code (N.D.C.C.) ch. 11-10.3 or N.D.C.C. § 11-10-04.

II.

It is my opinion a board of county commissioners may appoint a person who is not a qualified elector of the county to fill a vacancy in an elected state's attorney position only if a person who is not a qualified elector could have been selected as state's attorney in that county under home rule authority, by utilizing the joint powers procedures in N.D.C.C. ch. 11-10.3, or by utilizing the approval mechanism in N.D.C.C. § 11-10-04.

- ANALYSES -

I.

The state's attorney's office at issue is one in which the state's attorney is elected rather than appointed. N.D.C.C. § 11-10-04 states, "[e]xcept as otherwise specifically provided by the laws of this state, a county officer must be a qualified elector in the county in which the person is chosen or appointed . . . ." A state's attorney is a county officer to whom this requirement applies. N.D.C.C. § 11-10-02(4). Thus, a state's attorney must be a qualified elector in the county in which the person is chosen unless another state law provides otherwise.

In order to be a qualified elector in a county, a state's attorney "must be a resident of the county, as well as meet the necessary requirements to be a qualified elector as provided in Article II, Section 1 of the North Dakota Constitution." 1994 N.D. Op. Att'y Gen. 23. Article II, Section 1 of the North Dakota Constitution states that "[e]very citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector." N.D.C.C. § 16.1-01-04(1) provides that "[e]very citizen of the United States who is: eighteen years or older; a resident of this state; and has resided in the precinct at least thirty days . . . is a qualified elector." Accordingly, in order to be a qualified elector in a county, a state's attorney must be a resident of that county and at least eighteen years of age. In addition, to qualify for county office a person must establish residence in the county in which the person was elected at least thirty days prior to the date in January the person must qualify pursuant to N.D.C.C. § 11-10-05. See Letter from Attorney General Allen I. Olson to Ronald G. Splitt (September 14, 1978).<sup>1</sup> The determination of whether a specific individual is a resident of a county is a question of fact on which this office may not issue an opinion. See 1994 N.D. Op. Att'y Gen. 23.

"Every person has only one legal residence or domicile, as distinguished from the possibility of several actual physical residences." B.R.T. v. Executive Director of S.S. Bd. N.D., 391 N.W.2d 594, 598 (N.D. 1986). Because a state's attorney may have only one legal residence which must be in the county in which the state's attorney serves, a state's attorney may only serve in that office in one county unless another state law provides otherwise.

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<sup>1</sup> This result will be changed as a consequence of passage of Initiated Constitutional Measure No. 2 approved by the voters November 3, 1998. Hereafter, a candidate for county elective office "must be a resident in the jurisdiction in which they are to serve at the time of the election." (Emphasis added.) Id.

In both the county consolidated office form of government and the short form of county managership, the state's attorney is appointed rather than elected, and the state's attorney of an adjoining county may be appointed. See N.D.C.C. §§ 11-08-10 and 11-09-18. These sections are not relevant to counties, like Slope County, which do not operate under the county consolidated office form of government or the short form of county managership, and will not be discussed further in this opinion.

For counties which do not operate under either of the preceding two forms of county government, there are three major ways a person may serve as state's attorney without being a county resident.<sup>2</sup> First, the county would have to have a home rule charter and ordinance giving such authority to the county. See N.D.C.C. § 11-09.1-05(3). Second, the county would need to follow the procedures in N.D.C.C. ch. 11-10.3, which authorizes multi-subdivision office combinations through the use of joint powers agreements. According to the records of the Secretary of State, Slope County is not a home rule county, nor, apparently, has it followed the procedures of N.D.C.C. ch. 11-10.3.

The third way in which a person may serve as a state's attorney without being a county resident is pursuant to N.D.C.C. § 11-10-04: "[u]pon approval of the board of county commissioners of each affected county, a person may serve as an elected officer of more than one county and must be a qualified elector of one of the counties in which the person is elected." Since the procedure the county commissioners must follow to approve such an arrangement is not prescribed by the statute, the board of county commissioners may use its reasonable discretion in creating that procedure and making its decision. See Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988) ("Once a municipality's powers have been determined, . . . the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities."); 1997 N.D. Op. Att'y Gen. 32 (applying Haugland to a political subdivision other than a municipality). However, this approval would have to occur before the date the

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<sup>2</sup> In addition, N.D.C.C. § 11-16-06 authorizes a court to appoint an attorney to take the role of state's attorney for limited purposes when the county has no state's attorney or the state's attorney is absent, unable, or unwilling to perform the state's attorney's duties. It is not clear whether the court's appointee would have to be a qualified elector of the county. Also, N.D.C.C. § 44-02-10 authorizes a county governing body, under certain circumstances, to fill a vacancy due to a state's attorney's military service by appointing an attorney who resides in an adjoining county.

elected state's attorney would have to qualify for the office because at that time the office would become vacant. See N.D.C.C. §§ 44-01-04, 11-10-05, and 44-02-01(6).

Therefore, it is my opinion that one of the ways a person may serve as an elected state's attorney in a county in which the person is not a qualified elector is if the county commissioners of each county in which the attorney seeks to serve approve such an arrangement as authorized by N.D.C.C. § 11-10-04.<sup>3</sup> The term of office for that state's attorney would be four years. N.D.C.C. § 11-10-02.

## II.

A board of county commissioners must appoint a state's attorney if the office of state's attorney is vacant. See N.D.C.C. §§ 44-01-04, 44-02-04. Any such appointment "continues in force until the first general election thereafter, when the vacancy will be filled by election, and thereafter until the appointee's successor by election is qualified." N.D.C.C. § 44-02-08. Since county general elections occur every two years, an appointive term for a state's attorney would not exceed two years. The office of state's attorney is deemed vacant if any of the provisions of N.D.C.C. § 44-02-01 are present, including the failure of one elected for the position to qualify as provided by law. N.D.C.C. § 44-02-01(6). See also N.D.C.C. § 44-01-04 ("If any person elected to any . . . county office fails to qualify and enter upon the duties of such office within the time fixed by law, such office must be deemed vacant and must be filled by appointment as provided by law.").

N.D.C.C. § 44-02-09 provides the required qualifications of a person appointed to fill a vacant office. That section states that "[a] person appointed to office as provided in this chapter shall qualify within the time and in the manner required of a person elected or appointed to such office for a full term." N.D.C.C. § 44-02-09.

Thus, it is my opinion a board of county commissioners may appoint a person who is not a qualified elector of the county to fill a vacancy in an elected state's attorney position only if a person who is not a qualified elector could have been selected as state's attorney in that county under home rule authority, by utilizing the joint powers procedures in N.D.C.C. ch. 11-10.3, or by utilizing the approval mechanism in N.D.C.C. § 11-10-04.

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<sup>3</sup> See footnote 1 above.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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